UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 33

TROY GROVE A DIV. of RIVERSTONE GROUP INC., VERMILION QUARRY, A DIV. OF RIVERSTONE GROUP INC.	)	
Respondent,	)	Cases 25-CA-234477
and	)	25-CA-242081
	)	25-CA-244883
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO	)	25-CA-246978
Union.	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, 29 CFR § 102.46, TROY GROVE QUARRY, a Division of RIVERSTONE GROUP, INC., and VERMILION QUARRY, a Division of RIVERSTONE GROUP, INC., (collectively "Respondent" or "RiverStone"), by and through its attorneys, Califf & Harper, P.C., submits Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision as follows:

I. STATEMENT OF CASE

Attorneys for the Office of the General Counsel ("General Counsel") filed an Amended Consolidated Complaint ("Complaint") dated February 12, 2020, combining the above-referenced charges and alleging Respondent engaged in acts in violation of the National Labor Relations Act ("Act"). GC Exh.1(cc). Respondent timely filed its Answer to Amended Consolidated Complaint and Notice of Hearing ("Answer") on February 25, 2020, denying all unfair labor practice charges alleged in the Complaint. GC Exh.1(ee). The administrative hearing was conducted before Administrative Law Judge Melissa M. Olivero on March 10-11, 2020 in Peoria, Illinois. Judge Olivero issued the Administrative Law Judge's Decision ("ALJD") on January 11, 2021.[1]

In the ALJD, Judge Olivero concludes: (1) "By changing the punch-in policy for unit employees without providing the Union with notice or an opportunity to bargain, Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act ["Act"]"; (2) "By requiring employee Joe Ellena to sign a preferential hiring list located at its Vermillion Quarry, Respondent has violated Section 8(a)(3) and (1) of the [Act];" (3) "By removing union picket signs from public property, Respondent has violated Section 8(a)(1) of the [Act]; (4) "By disciplining and

[1] Citations to the record are as follows: Administrative Law Judge Decision (ALJD page:line), Transcript (Tr. page:line (Witness)); General Counsel Exhibits (GC Exh.# page, paragraph, or Bates Number); and Respondent Exhibits (R Exh.# page, paragraph, or Bates Number).

discharging employee Matt Kelly for his union activity, Respondent violated Section 8(a)(3) and (1) of the [Act];" and (5) "By interviewing employee Matt Kelly after denying his request for a union representative, Respondent violated Section 8(a)(1) of the [Act]." (ALJD 20:17-32.)

II. STATEMENT OF FACTS

RiverStone Group, Inc. operates crushed stone quarries in several locations to provide builders with high quality aggregates (crushed stone, sand, and gravel) for use in a wide variety of construction, environmental, and agricultural applications. Troy Grove and Vermilion are RiverStone quarries located in northern Illinois. The union of the equipment operators and maintenance employees at Troy Grove and Vermilion is the International Union of Operating Engineers, Local 150, AFL-CIO ("Union" or "Local 150"). The collective bargaining agreement ("CBA") between Respondent and Union became effective upon execution on July 30, 2014 and expired on May 1, 2016; Respondent and Union have not agreed on a successor collective bargaining agreement. GC Exh. 2. Article 17 of the expired CBA contained a no-strike provision. GC Exh. 2 at 13-14.

On March 20, 2018, nearly two years after the CBA expired, Union members went on strike and began picketing.[2] R Exh. 1. On April 9, 2018, Respondent began hiring permanent replacement workers, requiring them to sign a Notification of Employment, which included terms and conditions of employment set by Respondent and informed the workers that they were at-will employees who would not be terminated merely to make room for returning strikers, subject to a

[2] The Complaint alleged "[s]ince about March 8, 2020" employees at Troy Grove and Vermilion "ceased work concertedly and went on strike." GC Exh. 1(cc) at ¶ 6(a). However, the strike began March 20, 2018 per the date of the first strike letter Respondent received from an employee. R. Exh. 1. Respondent admitted paragraph 6(a) in its Answer as the Complaint's language indicated the March 8 date was an approximation and Respondent does not believe the difference is material to the instant charges. GC Exh. 1(ee) at ¶ 6(a). The ALJD uses March 8, 2020 as the strike date with no indication this is an approximation. Respondent believes the difference between the strike date the ALJ used in her ALJD and the actual strike date corroborated in the evidentiary record is immaterial to the instant charges, but notes the difference as it is repeated in the ALJD. *See, e.g.,* ALJD 4:10, 13:37.

strike settlement agreement or proceeding or order under the Act. R Exhs. 2, 7. The Union strike has been continuous, even as some strikers covered under the status quo of the expired CBA offered to return to work and were reinstated by Respondent. *See e.g.*, R Exh. 1; Tr. 143:4-144:18 (Lyle Calkins).

A. Charge 25-CA-246978

Permanent replacement worker Matthew Kelly was hired on May 14, 2018. His signed Notification of Employment was dated May 14, 2018. R Exh. 2. Kelly submitted a strike letter informing Respondent he was going on strike on May 9, 2019. GC Exh. 14. Kelly offered to return to work on June 26, 2019 and was reinstated and returned to work by Respondent on July 8, 2019. GC Exhs. 15, 16.

1. Kelly's Attendance Violations & Termination

Kelly arrived to work late for his scheduled 6:00 a.m. start (Tr. 56:15-16 (Scott Skerston), 184:15-16 (Matt Kelly)) on multiple occasions between May and August 2019 in violation of Respondent's attendance policy that an employee punch in for work by the employee's scheduled start time. Kelly was late on May 2 (6:26 a.m.), May 8 (6:30 a.m.), August 7 (6:54 a.m.), and August 14th (No punch-in). The timecards and written warnings for Kelly's first three attendance violations appear in Respondent Exhibit 6 (Bates Nos. RSG CONS 006433-34, 006437, 006440-41) and General Counsel Exhibits 9, 12, and 18. Respondent policy as of the February 27, 2019 superintendent training was to give employees violating the attendance policy a written warning and counseling for the first two violations within a 12-month period; to give a final written warning, counseling, and possible suspension for the third violation; and to terminate the employee following the fourth violation. R Exh. 4 at RSG CONS 001815-18; Tr. 242:22 – 249:15, 284:8 – 287:25 (Scott Skerston). Each warning was to be signed by the counseled employee and his

supervisor and a copy given to the employee. R Exh. 4 at Bates# RSG CONS 001815-18; Tr. 245:1-12, 246:1-12 (Scott Skerston). The supervisor was directed to make note on the written warning if the employee refused to sign. A suspension pending investigation was available to supervisors to gather necessary facts to determine the appropriate discipline, if any. Supervisor training for disciplinary guidelines and the written warning forms revised in January 2019 occurred on February 27, 2019. R Exh. 4 at Bates# RSG CONS 001815-18.

Following his first two attendance violations and consistent with policy, Kelly was counseled and given a first and second written warning by his supervisor, Superintendent Scott Skerston. Kelly refused to sign the written warnings as noted by Skerston on the warnings, but Kelly was provided copies of the written warnings. Exh. R6 at Bates# RSG CONS 006433-34, GC Exhs. 9, 12; Tr. 259:20 – 260:2 (Scott Skerston). After his third violation, Kelly was counseled and given a final written warning. Exh. R6 at Bates# RSG CONS 006440-41; GC Exh. 18; Tr. 69:19 – 71:14 (Scott Skerston). Kelly refused to sign the third and final written warning as noted by Skerston on the warning, but Kelly was provided a copy. R Exh. 6 at Bates# RSG CONS 006440-41; GC Exh. 18; Tr. 69:19 – 71:14 (Scott Skerston).

After Kelly's fourth attendance violation on August 14, he was suspended pending an investigation into his fourth violation. GC Exh. 19; Tr. 71:15 – 73:7 (Scott Skerston). The Notice of Suspension Pending Investigation, signed and dated on August 14, 2019 by Kelly and Skerston, and the investigation Questions for Matt Kelly, signed and dated August 14, 2019 by Kelly, are included in General Counsel's Exhibits 20 and 21. GC Exhs. 20, 21; Tr. 73:8 – 79:10 (Scott Skerston). Skerston and Tom Becker, Superintendent at Troy Grove, were in attendance for the meeting. Tr. 226:3-227:4 (Ben Gibson); Tr. 279:2-4 (Scott Skerston). Kelly asked to have employee Lyle Calkins present during the August 14th investigatory meeting for his fourth

attendance violation. Tr. 77:3-15 (Scott Skerston). Skerston told Kelly that he did not want to wait for Calkins to come down. GC Exh. 21; Tr. 75:20 – 79:10 (Scott Skerston). This is because Calkins was not at Vermilion Quarry, which is where Skerston was talking to Kelly. *Id.* Instead, Calkins was working a twenty-minute drive away at Troy Grove, the other quarry. *Id.* Although Superintendent Becker came from Troy Grove, he was already present for the meeting with Kelly; that is, there was no additional wait for Becker to arrive. Tr. 76:10-78:4 (Scott Skerston); Tr. 204:13-19 (Matt Kelly); Tr. 226:3-227:4 (Ben Gibson); Tr. 279:2-4 (Scott Skerston)). Kelly accepted Skerston's suggestion of Kelly's co-worker Ben Gibson (a permanent replacement worker), who was at Vermilion. *Id.* Following the investigation, Kelly was terminated for violating the attendance policy after three written warnings and counseling for his three previous violations within the same 12-month period. GC Exhs. 21, 22; Tr. 75:20 – 80:17 (Scott Skerston). The August 14, 2019 Termination of Employment letter for Kelly was admitted as General Counsel's Exhibit 22. Tr. 79:14 – 80:17 (Scott Skerston).

2. Kelly's Other Discipline

Kelly also was issued discipline for violations other than attendance, but was not terminated for the other discipline. Kelly was issued two written warnings on May 7, 2019. One warning was for using a cell phone to videorecord other employees working while he was operating a Company vehicle in violation of the cell phone safety policy. ALJD 7:8-25; R Exh. 3; GC Exh. 10; Tr. 54:1-55:11 (Scott Skerston); Tr. 192:8-193:1 (Matt Kelly). Kelly admitted using a cell phone while in a Company vehicle, but testified the vehicle was in park. Tr. 192:8-193:1 (Matt Kelly); ALJD 7:8-16. However, Kelly also admitted to using a cell phone while driving a Company vehicle at other times. Tr. 220:25-221:3 (Matt Kelly). This is a violation of the cell phone safety policy. R Exh. 3. The other May 7 warning was for Kelly's failure to diligently perform his assigned welding task in the pit, appearing multiple times that morning in the shop

speaking to another employee and making minimal progress on his welding task. ALJD 7:18-25; GC Exh.11; Tr. 55:23-58:5 (Scott Skerston); Tr. 193:3-194:8 (Matt Kelly). Kelly admits to entering the shop multiple times. Tr. 193:3-194:8 (Matt Kelly). Kelly was issued a written warning on July 10, 2019 for failing to follow the lockout/tagout safety protocol for the conveyor he was operating. ALJD 8:7-12; GC Exh. 17; Tr. 67:16-68:24 (Scott Skerston); Tr. 198:11-199:21 (Matt Kelly). Kelly admits he failed to follow the lockout/tagout procedure for the conveyor and that he received the written warning. Tr. 198:11-199:21 (Matt Kelly).

3. Kelly Disputes Physical Receipt of Written Warnings, but Not the Violations

Kelly admits his attendance violations and other discipline violations, but disputes he received any of the written warnings except for the July 10, 2019 warning for safety, the August 7, 2019 warning for attendance, and the August 14, 2020 suspension pending investigation for attendance. Tr. 62:20-63:14 (Scott Skerston).

B. Charge 25-CA-244883

Joseph "Joe" Ellena is a permanent replacement worker hired on May 21, 2018. R Exh. 7; Tr 159:3 – 18 (Joseph Ellena), 235:4 - 236:5 (Scott Skerston). Ellena went on strike May 20, 2019. GC Exh. 4. He offered to return to work on July 10, 2019. GC Exh. 5. Superintendent Skerston responded to Ellena's offer to return to work with a written notice informing Ellena there was not an open position and that he could sign the preferential hiring list if he wished to do so. GC Exh. 6(a), 6(b); Tr. 41:7 – 45:5 (Scott Skerston). Specifically, Respondent's notice to Ellena read:

> Dear Joe:
>
> I received the email from Steve Russo that had attached to it your letter stating your unconditional and immediate offer to return to work immediately.
>
> There are no job openings at this time. The Company has established a preferential hiring list which you are welcome to sign if you wish to do so. The preferential hiring list is located at Vermilion.

If you have any questions, please call me at (815) 481-7445.

I am also sending a copy of this letter to Steve Russo by email (SRusso@local150.org) and request that he also contact you to tell the information contained in this letter.

Sincerely,

Scott Skerston
Superintendent

GC Exh. 6(a). Despite the ALJD indicating a copy of the preferential hiring list was attached to the letter to Ellena regarding his offer to return to work, Respondent did not attach a copy, and no one entered testimony suggesting that it was. ALJD 14:19-21.

C. Charge 25-CA-242081

At the time of the alleged violation of the Act in January 2019 and for more than six months prior, the work schedule set by Respondent for the bargaining unit employees was 6:00 a.m. to 4:00 p.m., Monday through Thursday. *See, e.g.*, Tr. 56:15-16 (Scott Skerston); Tr. 159:3 – 18, 161:1-2 (Joseph Ellena). Employees punching in early for their scheduled start time are paid time and a half for the resulting unscheduled, unauthorized overtime. See, e.g., Tr. 186:6-18 (Matt Kelly); Tr. 239:13-21 (Scott Skerston).

At the hearing, witnesses admitted that in December 2018, after observing a co-worker punching in early for his shift and getting overtime pay, they resolved to break from practice and clock in early for their shifts as well in order to get unscheduled, unauthorized overtime:

Tr. 137:

...

5 Q And to the best of your knowledge, have you ever
6 had a discussion with other employees about punching in
7 early?
8 A Yes, sir.

9 Q And who did you have that discussion with?
10 A Lyle Calkins, Scott Currie, and Joseph Allena.
11 Q And when did that discussion take place?
12 A Early January of 2019.

....

24 Q Okay, and what was discussed?
25 A There was an employee that I work with that punches

Tr. 138

1 in early, and Joseph Ellena was working at the
2 Vermillion Quarry, and stated that there were employees
3 down there punching in early, as well.
4 Q Okay.
5 A And they were being paid for their overtime.
6 Q Okay. So, when they punched in early, how were
7 they getting paid?
8 A They would get paid from the minute they punched
9 in.
10 Q Okay, would that be straight time or time and a
11 half?
12 A Time and a half.
13 Q So that was overtime?
14 A Yes.
15 Q And what, if anything, did you do in response to
16 that discussion?
17 A I decided that I was going to punch in early and
18 see if they paid me.
19 Q Okay, and when did you start doing that?
20 A It was mid-January of 2019.
21 Q And so on the first day of -- you said you clocked
22 in early, what time did you clock in?
23 A I believe it was 5:30, give or take five minutes.
24 Q And how often did you do that?
25 A For three consecutive days.

Tr. 139

1 Q And what, if anything, happened on the fourth day?
2 A I believe the third day was a Thursday, and we
3 don't work Fridays. We did not work the following
4 Monday for cold weather, so when we showed up to work on
5 Tuesday, there was a notice saying that we could punch
6 in -- can't punch in more than five minutes before our
7 start time.

Tr. 137:5 – 139:7 (Bradley Lower).

Superintendent Scott Skerston reviewed Lower's December timecards, noting Lower punched in early repeatedly, sometimes as much as 30 minutes before his 6:00 a.m. scheduled start time. R. Exh.8 Bates # RSG CONS 00667-68; Tr. 237:17 – 242:6 (Scott Skerston). No discipline was issued to Lower or any other operator for these early clock-ins, but Skerston later posted next to the time clock the five-minute punch-in notice prohibiting employees from punching in earlier than five minutes before their scheduled start time. GC Exh. 27; Tr. 242:3-6 (Scott Skerston).

D. Charge 25-CA-234477

After employee Webber filed the Decertification Petition on June 11, 2018 (25-RD-221796), Respondent contracted with Jim Misercola, a persuader under the Labor-Management Reporting Disclosure Act, to communicate with employees concerning the Decertification Petition. Tr. 314:4-19. The Complaint alleges that on January 2, 2019, Respondent, through its agent, Jim Misercola, interfered with the employees' Section 7 rights by removing Union picket signs from public property. GC Exh.1(cc) ¶¶ 5(a), 9. Misercola denies removal of any Union picket sign. Tr. 312:1-3, 315:9-14 (James Misercola). General Counsel and the Union's witnesses admitted at the hearing that they knew Misercola was a persuader hired by Respondent, they did not like him because of his role, they could identify him by sight, they were sitting in or standing immediately outside a truck 80 yards away when the alleged act took place, they did not actually see him remove a sign, and there was no sign in the area when they investigated after Misercola allegedly drove away. Tr. 97:7-23, 100:19-25, 101:1-14, 102:7-25 (Thomas Brown); Tr. 113:4-126:23 (Shane Bice).

III. ISSUES PRESENTED

A. **Whether disciplining a permanent replacement worker who supports the Union and engaged in protected activities for workplace violations he admits having committed is a violation of Section 8(a)(3) and (1) of the Act**

B. **Whether a permanent replacement worker has *Weingarten* rights while a strike is ongoing**

C. **Whether an employer commits an unfair labor practice by offering an employee an alternative representative, which the employee accepts, when he exercises his *Weingarten* rights**

D. **Whether an employer's retention of a persuader is proof of anti-union animus**

E. **Whether giving an employee the opportunity to sign a preferential hiring list requires the employee to do so**

F. **Whether it is necessary to create a preferential hiring list for only one employee offering to return to work**

G. **Whether an employer may unilaterally change a punch-in policy for permanent replacement workers**

H. **Whether an employer prohibiting employees from punching in earlier for their start time than was their previous practice is a unilateral change by the employer or the employer lawfully responding to a unilateral change by employees**

IV. ARGUMENT FOR EXCEPTIONS 1-10 (CHARGE 25-CA-246978)

General Counsel's complaint alleges Respondent disciplined and terminated permanent replacement worker Matt Kelly for his protected Union activity and violated his *Weingarten* rights by refusing his request for Union representation during a disciplinary meeting to interfere, restrain, and coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act and to discriminate in regards to terms of conditions of employment to discourage union membership in violation of Sections 8(a)(1) and (3) of the Act. GC Exh.1(cc). The ALJ erred in finding that General Counsel met its burden of establishing these violations. ALJD 20:28-35. The ALJ's fact findings and legal conclusion are unsupported by the evidence presented at the hearing.

ALJD 2:38-41, 6:20-10:11, 11:34-39, 12:1-26, 20:28-35. Respondent did not discriminate against Kelly or discourage his protected activities in violation of the Act, but rather terminated Kelly for his repeated violations of the attendance policy after he was given the opportunity to have a representative at his investigatory meeting, even though he was not entitled to *Weingarten* rights as a permanent replacement employee.

A. Kelly was disciplined and terminated for his attendance violations, not his protected concerted activity.

Section 8(a)(3) of the Act prohibits discrimination in hiring, tenure, or other terms and conditions of employment to encourage or discourage union membership. 29 U.S.C. § 158(a)(3). The Board's *Wright Line* test is well-established as the legal framework for showing the requisite anti-union animus in 8(a)(3) charges against employers. *Contemporary Cars, Inc. v. NLRB*, 814 F.3d 859, 874-875 (7th Cir. 2016) (citing *Wright Line*, 251 NLRB 1083 (1980)). Under the *Wright Line* test, to prove an employer discriminated against an employee, the charging party must first establish the following: (1) the employee engaged in a protected activity, (2) the decision-maker knew it, and (3) the employer acted because of anti-union animus. *See, e.g., Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 713 (7th Cir. 2015). There must be "a causal connection between the animus and the implementation of the adverse employment action." *Contemporary Cars, Inc.*, 814 F.3d at 874-75 (citing *Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 533 (7th Cir. 2003)). The burden then shifts to the employer "to either rebut that evidence or mount an affirmative defense that the [employer] would have taken the same action despite the employee's protected activities." *Big Ridge, Inc.*, 808 F.3d at 713-14. The Board may then conclude that the employer's explanation was a pretext because the stated reason did not exist or the employer did not actually rely on it." *Contemporary Cars*, 814 F.3d at 875 (citing *Huck Store Fixture Co.*, 327 F.3d at 533).

In the instant case, General Counsel and the Union fail the third element of the *Wright Line* test because Respondent did not terminate Matt Kelly for his protected concerted activity or because of anti-union animus, but rather for his four violations of the attendance policy. The Attorney for the General Counsel also fails because Respondent would have taken the same action despite the employee's protected activity.

The ALJ erred in concluding "[t]he evidence further establishes that Respondent bore animus toward Kelly's union activity and toward the Union in general." ALJD 16:23-24. In support of this, she writes "Respondent hired Misercola to discourage union activity by its employees." ALJD 16:24-25. As noted earlier in the decision, she found as a matter of fact "[s]ince at least 2018, Respondent has employed James Misercola as a 'persuader,' who provides people with information in order to secure no votes in union elections. ALJD 2:38-39; Tr. 311:17-25 (James Misercola).) The ALJ has explicitly and incorrectly found in violation of the Act that the mere hiring of a persuader is proof of anti-union animus which can be used against an employer. ALJ 16:23-25. This is not permitted under the Act, and the decision includes no citation to caselaw supporting this finding. Section 8(c) of the Act recognizes an employer's freedom of expression and provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 USC § 158(c); *see also, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) ("Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"). Because Respondent's retention of Misercola as a persuader during the decertification campaign is not itself a threat of reprisal or force or

promise of benefit, the ALJ erred in using Respondent's use of a persuader as evidence of an unfair labor practice, or more specifically in the instant case, as evidence of anti-union animus to support an unfair labor practice claim. The ALJ's incorrect conclusion in violation of the Act that the hiring of a persuader is proof of animus permeates her decision, her incorrect findings of fact, and her incorrect findings of law.

The ALJ also finds animus because "when Skerston saw Kelly wearing a union shirt at work for the first time, he asked, 'Are you kidding me?'" and "compared Kelly to Joe Ellena, another replacement worker who had gone on strike in support of the Union." ALJD 16:25-27; Tr. 48:7-49:7 (Scott Skerston); Tr. 190:16-191:12 (Matt Kelly). These comments carry no inherent "threat of reprisal or force or promise of benefit" that would deprive Respondent through its supervisor, Skerston, of protection from Section 8(c) of the Act, prohibiting use of employer's right of expression from use as evidence of an unfair labor practice. 29 USC § 158(c). Further, Kelly himself said he took Skerston's comment asking if Kelly was taking Ellena's place to mean asking whether Kelly is the Union spokesperson:

> 10 Q When Skerston [said] you're taking over Joe's place, what
> 11 did you understand him to mean?
> 12 A As the spokesperson for 150.

Tr. 191:10-12 (Matt Kelly). That is, Kelly did not say he felt threatened or coerced. In her witness credibility assessments, the ALJ wrote "I found Matt Kelly to be generally credible" and "I credit Kelly's testimony." ALJD 11:34, 11:38-39. Because Skerston's alleged comments are not threatening or a promise of benefit and Kelly did not say he interpreted them as such, Section 8(c) of the Act does not permit the comments to be used as evidence of an unfair labor practice, or, more specifically here, as evidence of animus. Therefore, the ALJ erred in finding that they are proof of animus.

The ALJD included precedent that "animus can be inferred from other evidence, such as "suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly [disciplined], and disparate treatment. *Medic One, Inc.*, 331 NLRB 464, 475 (2000). *See also Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005) (timing); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) and *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment); *Baptist Hospital, Orange*, 328 NLRB 628, 635 (1999) (failure to follow established procedures)." ALJD 16:29-35, 16:37-40, 17:1-9.

The ALJ erred in finding animus in the timing of Kelly's discipline and the number of discipline warnings issued to him. ALJD 16:29-35, 16:37-40, 17:1-9. However, she errs in inferring animus because of the timing and number of Kelly discipline despite the timecards proving Kelly punched in late for work and her own finding that Kelly is a credible witness who admitted to committing all the violations: "Kelly candidly admitted to committing all of the disciplinary, safety, and attendance infractions alleged by Respondent." ALJD 11:34-35; R Ex 6 at Bates# RSG CONS 006433-34, 006437, 006440-41; GC Exhs. 9, 12, 18-21. In *Medic One, Inc.*, 331 NLRB 464, 476 (2000), a case cited in the ALJD, the Board found that under a totality of circumstances, the discipline of an employee suspected by the Company of being engaged in union activity and who "knowingly engaged in conduct which she knew possibly violated the Respondent's crew exchange policy," was not discriminatory under the Act even though the timing of the delayed suspension was "unwise." In the instant case, Kelly has admitted to committing the substance of all the violations; thus, Kelly is responsible for the timing of the violations because he is the one who committed the violations, for which prompt discipline was issued by Respondent. In *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999), the Board found that General Counsel

had shown animus where an employee who was discharged on a first offense shortly after the employee participated in protected activity for a violation the employee denied occurred, where the employer at different times provided different reasons for the same discharge, and where the employer had been found to have committed other violations of the Act. *Naomi Knitting Plant* is distinguishable from the instant case because Kelly has admitted to committing the violations, and as noted above, the timing of the discipline is determined by Kelly's admitted commission of the violations, not Respondent.

The ALJ erred in finding animus in the number of disciplinary actions Kelly received compared to other employees and in the fact Kelly was the only employee to have been terminated for attendance because she misapplies the test for disparate treatment. ALJD 16:29-35, 16:37-40, 17:1-9. The Board and courts look to several factors in determining whether anti-union animus can be inferred, including "[d]isparate treatment of certain employees compared to other employees with similar work records or offenses." *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1479 (6th Cir. 1993). Thus, the test for disparate treatment is not whether an employee was terminated or disciplined as much or more than other employee (as the ALJD appears to do), but whether an employee was treated less favorably compared to other employees who committed similar offenses. In the instant case, the record shows other employees received discipline for similar offenses for which Kelly was disciplined and admits having committed; there were attendance violations for other employees, as well as safety violations, performance violations, and conduct violations. R Exh. 6; Tr. 268:7-279:1 (Scott Skerston). Nothing in the record indicates other employees committed the same violations and were not disciplined according to the same guidelines applied to Kelly during the same period. R. Exhs. 4, 6. Thus, Kelly was not treated

less favorably by Respondent in issuing discipline than employees who committed the same violations. Kelly had more discipline because he committed more violations than other employees.

The ALJ erred in finding animus because Respondent "failed to follow its own policies in disciplining Kelly" when it incorrectly marked the type of warning on one written warning and did not chronologically list prior warnings of the same type on the warning forms as advised in the first slide of the superintendent training, but not the Warning Form Guidelines slide within the training. ALJD 17:11-22; R Exh. 4 Bates# RSG CONS 001815-18; R Exh. 6 Bates# RSG CONS 006438-39; R. Exh. 4; GC Exs. 13, 17. The May 9, 2019 safety warning, (GC Exh. 13), includes two types of warnings on one form (2nd Written and Final Warning) in error, but the subsequent July 10, 2019 safety warning, (GC Exh. 17), includes the corrected type of warning (Final Warning) for safety after issuance of two prior written warnings for safety.

As described above, anti-union animus can be inferred from an employer's departure from past practice in discharging or disciplining an employee thought to have engaged in protected activity. *Medic One, Inc.*, 331 NLRB at 475; *see also*, *Baptist Hosp., Orange*, 328 NLRB 628, 634 (1999) ("The Hospital has a due process policy which provided for counseling and warnings prior to discharge. Due process could be bypassed in the 'most severe' types of misconduct upon written authorization of the Hospital Administration. There is no such authorization in evidence."). However, the departure from past practice in those cases involved substantive departures from past practice. In *Medic One*, the Board addressed how quickly the employee was disciplined and whether the employer issued the employee the same discipline as other employees who committed similar offenses and how quickly the employer instituted the discipline. 331 NLRB at 475. In *Baptist Hosp.*, the employer completely disregarded existing disciplinary policy, issuing unauthorized discharge without prior counseling or warning. In the instant case, Respondent did

not include a chronological listing of prior warnings of the same type of infraction as advised on the first slide of the superintendent training for the new warning form and guidelines; but, this chronological listing is not indicated on the face of the form itself and is not required per the actual Warning Notice Guidelines. R Exh. 4 Bates# RSG CONS 001814-18. The ALJ erred in equating a deviation from supervisory training guidelines about how to complete the new warning form with a substantive deviation from the actual disciplinary policies as the basis for inferring animus where the ALJ has found Kelly to have admitted committing all the violations described in the written warnings.

Even if the ALJ's determination General Counsel proved its prima facie case against Respondent, which the record does not support, the ALJ erred in finding Respondent's basis for discharging Kelly was pretextual because the ALJ also determined Kelly committed all the violations described in the written discipline; the ALJ also erred in finding Respondent did not give consistent reasons for terminating Kelly since Respondent issued Kelly discipline during his tenure with RiverStone for multiple infraction types, including attendance, safety, performance, and conduct. ALJD 17:24-18:14; R Exh. 6. As described above, the record is replete with Kelly's admissions of committing the violations and evidence of Kelly's late punch-ins at work. *See e.g.*, ALJD 7:1-8:33, 11:34-35. If Kelly admits he committed the conduct violative of workplace rules and described in the discipline, it clearly means the reasons did exist. The ALJD cites to no case in which an employer was found to have violated the Act by disciplining and/or discharging an employee who engaged in protected activity, but admitted to committing workplace violations for which he was disciplined and for which other employees have been subject to discipline.

Further, Respondent has been consistent in maintaining Kelly was terminated, not because of his protected activity, but because he had received four attendance violations for unexcused

tardiness within a 12-month period, for which disciplinary guidelines direct termination of employment. R Exh. 4 Bates# RSG CONS 001815-18; Tr. 79:16-80:6 (Scott Skerston); GC Exh. 19-22. It is evident in the termination letter to Kelly (GC Exh. 22) that he was being terminated for the four attendance violations within a year, and at no time did Respondent depart from this basis for the termination of Matt Kelly. Respondent admits it issued written discipline to Matt Kelly for various infractions during the relevant time period; however, it never proffered discipline unrelated to attendance as a basis for Kelly's termination in August 2019. Furthermore, under the disciplinary guidelines in effect in 2019, issuance of written discipline was cumulative by infraction type. ALJD 3:29-4:2; Tr. 27:19-31:22, 242:22-246:12 (Scott Skerston). Thus, an employee would not be terminated for his first attendance violation even if he had three prior written warnings for performance.

The ALJ erred in finding Respondent's basis for terminating Kelly for his attendance violations is pretextual because Kelly said he had not received any of the discipline from Respondent, even though the ALJ found Kelly admitted to committing the violations described in the discipline. ALJD 11:34-35, 17:43-18:6. The ALJ cited *Lord Industries, Inc.*, 207 NLRB 419, 422 (1973), in support of her finding that Respondent's assertion Kelly was discharged for attendance violations was pretextual. ALJD 17:43-18:6. However, *Lord* is distinguishable in that *Lord* involved an employer who had limited to no support or basis for the discipline drafted, discipline which wasn't issued to employees, wasn't drafted contemporaneously, didn't comply with the employer's policy of three warnings prior to discharge, and discipline disputed by the employees. In the instant case, the ALJ found Kelly admitted to committing all the violations described in the written discipline. Therefore, the ALJ's finding that Respondent's issuance of discipline for the reasons stated in the discipline was pretext because Kelly allegedly did not

receive the write-ups at the time they were written is wrong because it is undisputed Kelly committed the substance of the violations.[3]

Respondent's attendance policy requires that an employee punch-in for work by the employee's scheduled start time. Kelly's regularly scheduled start time was 6:00 a.m. Under Respondent's progressive discipline policy for attendance violations, adopted in March 2019, Kelly was given his first written warning and accompanying counseling by Superintendent Scott Skerston on May 6, 2019 because he was late for work on May 2, 2019, punching in sixteen minutes late at 6:16 a.m. R Exh. 6 Bates# RSG CONS 006433-34; GC Exh. 9. In addition to the required counseling regarding the attendance policy, the written warning notice, including the check boxes at the top of the form for first, second, and final warnings, with no box for a fourth warning, put disciplined employees on notice that the consequence for a fourth violation of the attendance policy, also described in the written warning, is a termination. Kelly's second attendance violation occurred on May 8, 2019 when he arrived late for work, punching in 30 minutes late at 6:30 a.m. R Exh. 6 Bates# RSG CONS 006437; GC Exh. 12. On the same day, he was counseled and given his second written warning by Skerston. *Id.* Kelly submitted his strike letter on May 9, 2019, one day after his second written warning. GC Exh. 14. However, he offered

[3] In her findings of fact, the ALJ wrote Superintendent Skerston "always checked the box indicated that the notice was given to the employee whether or not the employee received the notice," citing to the transcript. ALJD 8:35-38; Tr. 63:10-13 (Scott Skerston). This is incorrect and implies a response not made in testimony. In responding to the Attorney for General Counsel, Skerston did not say he checked the box "whether or not" the employee received the notice—he said he always checks the box when he *gives* discipline:

10 Q Do you always check that box when --
11 A Yes.
12 Q -- when you give discipline?
13 A Yes.

Tr. 63:10-13 (Scott Skerston). The ALJ did not reference this fact finding in her Discussion & Analysis, but Respondent takes exception to this finding of fact to the extent it may have been relied upon in finding Respondent discriminated against Kelly by issuing him discipline, especially regarding the ALJ's finding of pretext. ALJD 17:43-18:6.

to return to work in late June and did so as indicated by his signature on a July 8, 2019 letter from Skerston thanking him for returning to work. GC Exh. 15, R Exh. 9.

Nearly a month after his return, Kelly's third attendance violation within a 12-month period occurred on August 7, 2019 when he arrived late for work, punching in 54 minutes late at 6:54 a.m. R Exh. 6 Bates# RSG CONS 006440-41; GC Exh. 18. Skerston gave Kelly a final written warning and counseling, but did not suspend him. *Id.* One week later, on August 14, 2019, Kelly's fourth attendance violation occurred when he did not arrive for work and punch in by his 6:00 a.m. scheduled start time. GC Exhs. 20, 21. When Kelly had not arrived by 6:25 a.m., Skerston began drafting paperwork for a suspension pending investigation for Kelly's fourth violation. GC Exh. 19. Kelly completed, signed, and dated the investigation Questions for Matt Kelly on August 14 and signed the Notice of Suspension Pending Investigation on the same day. GC Exhs. 20, 21. Following review of the answered Questions for Matt Kelly, Respondent terminated Kelly on August 14, 2019 for his repeated attendance violations despite multiple written warnings and counseling. GC Exh. 22.

Respondent discharged Kelly for his attendance violations. The evidence presented at the hearing supports this, and nowhere in the record does Kelly or any other witness dispute his attendance violations. Respondent did not discharge Kelly for engaging in a strike, supporting the Union, or any other protected concerted activity. The warning guidelines and revised written warning forms were adopted in March 2019. Kelly was disciplined before he went on strike for his attendance and conduct violations, and he was disciplined after he returned from strike for his continued attendance violations and safety and performance violations. Kelly was not treated differently because he went on strike or supported the Union. Therefore, because Kelly's protected concerted activity was not a factor in Respondent's decision to issue him discipline for his

attendance, safety, and performance violations and to terminate him for a legitimate business reason – repeated attendance violations, the Union's charge fails the *Wright Line* test and the ALJ erred in finding Respondent violated the Act.

B. Kelly had no *Weingarten* rights, but was permitted to have a representative present during his investigatory meeting.

There was no *Weingarten* violation because (i) as a permanent replacement worker, Kelly has no *Weingarten* rights and (ii) even if he would have *Weingarten* rights, they were granted because Respondent permitted Kelly and Kelly agreed to have a fellow employee accompany him.

1. Kelly was a permanent replacement worker not covered by the status quo for the expired collective bargaining agreement.

It is settled law that an employer can make unilateral changes to terms and conditions of employment for replacement workers, hired as permanent replacements for economic strikers. *See, e.g.*, *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 246 (7th Cir. 1982). This is so because the "interests of strike replacements are different from those of strikers and the Union cannot be expected to effectively represent these conflicting interests." *Id.* "Strike replacements can reasonably foresee that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job. It is understandable that unions do not look with favor on persons who cross their picket lines and perform the work of strikers." *Capitol-Husting*, 671 F.2d at 246 (quoting *Leveld Wholesale, Inc.*, 218 NLRB 1344, 1350 (1975)).

There is no collective bargaining agreement currently in effect as the predecessor agreement has expired without renewal, the Union has struck, and no agreement has been reached between the Union and Respondent regarding a new CBA. Therefore, after the Union struck on March 20, 2018, Respondent began hiring permanent replacement workers and provided the replacements with terms and conditions of employment that differed from that due bargaining unit members under the predecessor CBA. Specifically, the permanent replacement workers were not

granted pension participation, nor a grievance procedure. The permanent replacement workers were provided notice of the different terms subject to Respondent's discretion unless a collective bargaining agreement becomes effective or a settlement or NLRA proceeding directs otherwise; thus, as to wages, hours, and terms and conditions of employment for permanent replacement workers, the Union is not the exclusive collective bargaining representative for the permanent replacement workers generally nor Matt Kelly specifically as to wages, hours, and terms and conditions of employment. Respondent hired Matt Kelly on May 14, 2018 as a permanent replacement, and Kelly signed and dated the attached Notification of Employment acknowledging his terms of employment would differ from those under the expired CBA subject to Respondent's discretion and that he was an at-will employee. R Exh. 2.

2. Permanent replacement workers not covered by a collective bargaining agreement during a strike do not have *Weingarten* rights.

Weingarten rights do not exist for permanent replacement workers because (1) a union has a conflict of interest in representing both permanent replacement workers and the economic strikers they replace; (2) a union cannot change the imbalance between an employer and permanent replacements with whom an employer can deal directly and unilaterally set wages, hours, and terms and conditions of employment; and (3) imposing a *Weingarten* right would undermine the benefits of workplace investigations for permanent replacement workers.

a. The Union does not represent the interests of the permanent replacement workers who replace the striking employees.

Where a union economic strike exists and the employer hires permanent replacements, the union does not represent the interests of the permanent replacement workers who replace the striking employees, and an employer may deal directly with permanent replacement workers and unilaterally set wages, hours, and terms and conditions of employment for the replacements. *See, e.g.*, *Capitol-Husting*, 671 F.2d at 246. In establishing *Weingarten* rights, the emphasis was on

granting an employee's request for the presence of a union representative because the union was duty bound to represent not just the individual employee, but the common interest of all members of the bargaining unit: "In W*eingarten*, the Supreme Court emphasized that a union representative accompanying a unit employee to an investigatory interview represents and 'safeguards' the interest of the entire bargaining unit." *IBM Corp.*, 341 NLRB 1288, 1291 (2004) (quoting *NLRB v. J. Weingarten*, 420 U.S. 251, 260 (1975)). The Board expounded, writing:

> The union's officials are bound by the duty of fair representation to represent the entire unit. Whatever the union representative accomplishes inures to the benefit of the entire unit, not just to the individual employee.

IBM Corp., 341 NLRB at 1291.

However, there is no common interest representation by a union where there are striking employees and permanent replacement workers. *Weingarten* rights only apply to the entire bargaining unit when the union represents the common interest of all bargaining unit employees. In *E.I. DuPont & Co.*, 289 NLRB 627 (1988), the Board reaffirmed its view that "*Weingarten* rights apply only in a union setting" and "maintained its position that unrepresented employees do not possess a Section 7 right to the presence of a fellow employee in an investigatory interview." *IBM Corp.*, 341 NLRB at 1291. "[T]he Board noted that because the employee representative in a nonunion setting has no obligation to represent the entire work force as does a union representative, he is less likely to 'safeguard' the interest of the entire workforce." *Id.* Similarly, in the instant case, the common interest "safeguard" does not exist because the Union cannot represent both the striking employees and those who permanently replaced those same striking employees. The permanent replacement workers have an interest in keeping their jobs, and the Union has an interest in continuing the strike against Respondent and/or returning strikers to the positions held by the permanent replacement workers. Therefore, because the Union does not have

a common interest with the permanent replacement workers, *Weingarten* rights do not apply to Permanent Replacements, including permanent replacement Matt Kelly.

b. The Union cannot redress the imbalance of power between Respondent and permanent replacement workers.

The Union cannot redress the imbalance of power between Respondent and permanent replacement workers because Respondent may deal directly with replacements on an individual basis and unilaterally set wages, hours, and terms and conditions of employment for the replacements. In overruling the Board's decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), which overruled *E. I. DuPont & Co.*, 289 NLRB 627 (1988), in holding that *Weingarten* rights apply to all employees regardless of union representation, the *IBM Corp.* Board returned to the policy advocated in *DuPont*, explaining as follows:

> The *Epilepsy* result does not take into account the significant policy considerations relevant to a nonunion work force. The critical difference between a unionized work force and a nonunion work force is that the employer in the latter situation can deal with employees on an individual basis. The Board's decision in *Epilepsy* does not take cognizance of that distinction. Thus, for this reason as well, grounded in national labor policy, we choose not to follow *Epilepsy*."

IBM Corp., 341 NLRB at 1292.

Similarly, in the instant case, *Weingarten* rights do not apply to the permanent replacement workers, with whom Respondent is permitted to deal directly on an individual basis rather than the Union, because the Union's representation of the striking employees conflicts with the interests of the permanent replacement workers. As a result, the Union cannot redress the imbalance between Respondent and the Permanent Replacements, and granting *Weingarten* rights to the presence of a Union representative for Permanent Replacements would provide no additional protection to Permanent Replacements governed by different terms and conditions of employment subject to Respondent's discretion.

c. Imposing a *Weingarten* right undermines the benefits of workplace investigations.

An employer is not required to conduct an investigatory interview and may decide a course of action without conducting an interview to avoid the burden of *Weingarten* rights. The *IBM Corp.* Board recognized, "as did the *DuPont* Board, that the parties to a workplace investigation have the option to forego an interview, which allows the employer to reach a conclusion and impose discipline based on its independent findings." *IBM Corp.*, 341 NLRB at 1294. However, employees covered under the terms of a CBA usually have a grievance procedure, which gives employees the opportunity to tell their side of the story even if an employer decides not to conduct an investigatory interview. It is very different for employees not covered by a CBA with a grievance procedure because the interview may be their only opportunity to tell their side if the story. The *IBM Corp.* Board recognized this distinction:

> As for the employee involved, if the interview is not held, he loses the chance to tell his version of the incident under investigation because there typically is no grievance procedure in a nonunion setting to provide an alternative forum. This, in essence, forces the employer to act on what may possibly be, at best, incomplete information and, at worst, erroneous information.

Id. For this reason, the Board in *IBM Corp.* found that "on balance, the right of an employee to a coworker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations." *Id.* Although the *IBM Corp.* Board is discussing a non-unionized workforce, its analysis (and that of *DuPont* and *Epilepsy Foundation)* is addressing a situation in which workers' interests are not safeguarded by a union. Such is the case in the instant matter. Although a permanent replacement worker may support the Union, the terms and conditions of employment for permanent replacements are not governed by the expired CBA and the collective employment interest of the permanent replacement workers conflict with the Union's collective bargaining interest on behalf of the strikers the permanent replacement workers replaced. Thus, the Union does not represent the

permanent replacement workers' interest, and the situation is analogous to that described in *IBM Corp.*—without union representation, policy favors denying *Weingarten* rights.

Finally, even if it is determined that Kelly was owed a right to the presence of a representative at his investigatory meeting, which he was not, Respondent did allow Kelly to have an agreed representative present—his co-worker Ben Gibson. Kelly's first choice, Lyle Calkins was denied by Respondent because Calkin's approximately 20-minute drive from his Troy Grove work location to Vermilion would have delayed the investigatory meeting at Vermilion, where Kelly was assigned. Tr. 75:20 – 79:10. Additionally, Skerston's suggestion of Kelly's co-worker at Vermilion, Ben Gibson, was accepted by Kelly, and Gibson was permitted to be present during the investigatory meeting. *Id.* The Board has "stressed the admonition in *Weingarten* that the right to choose representation should not interfere with an employer's legitimate business interests, such as conducting investigatory interviews without undue delay." *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 277 (4th Cir. 2003). In *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981), the Board held that an employer is not required to delay an investigation for an unavailable off-site representative 20 minutes away where there was an available on-site representative). The *Pacific Gas* Board also recognized the holding in *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977), that "w[h]ere another union representative was available, but the employee did not request him, the employer did not violate Section 8(a)(1) of the Act by proceeding with the interview in the absence of a representative." *Pacific Gas*, 253 NLRB at 1143. Thus, although Respondent was under no obligation to conduct the investigatory meeting or to allow Kelly to have a co-worker present during the meeting, Respondent nevertheless allowed Kelly to have an agreed co-worker present and no violation of the Act or alleged, but inapplicable, *Weingarten* rights occurred.

For the reasons stated above, the ALJ erred in finding permanent replacement worker Kelly had *Weingarten* rights and was denied them when he accepted an alternative representative. ALJD 18:18-21. Further, in her decision, the ALJ incorrectly states Respondent offered no reason Superintendent Becker from Troy Grove was able to attend the meeting, but not Calkins who was working at Troy Grove. ALJD 19:27-31. The testimony from Scott Skerston and Matt Kelly both indicate Becker was already at Vermilion for the Kelly meeting when Kelly asked for Calkins. Although Superintendent Becker came from Troy Grove, he was already present for the meeting with Kelly; that is, there was no additional wait for Becker to arrive, but there would have been for Calkins. Tr. 76:10-78:4 (Scott Skerston); Tr. 204:13-19 (Matt Kelly); Tr. 226:3-227:4 (Ben Gibson); Tr. 279:2-4 (Scott Skerston).

V. ARGUMENT FOR EXCEPTIONS 11-13 (CHARGE NO. 25-CA-244883)

General Counsel's Complaint alleges Respondent violated Section 8(a)(3) by telling Joseph Ellena that he was required to sign the preferential hiring list:

> Since about 7/12/2019, the above-named Respondent, by its officers, representatives and agents, has interfered with the rights of former strikers upon their unconditional offer to return to work, by establishing a signup requirement for their addition to a preferential hire list.

The ALJ erred in finding General Counsel proved its case because (1) Respondent did not require Ellena to sign the preferential hiring list in order to be rehired; (2) it is not necessary for Ellena's name to be placed on the preferential hiring list to establish order of recall because he is the only striker that offered to return to work when there was not a vacancy; and (3) Respondent did not discriminate pursuant to Section 8(a)(3) of the Act against Ellena when it gave Ellena the opportunity to sign the preferential hiring list. The ALJD and General Counsel anticipate Respondent will not reinstate Ellena when a vacancy opens because he did not go to Vermilion to sign a list, but there is no vacancy, there is no requirement for Ellena to sign the list, and

Respondent has not denied Ellena reinstatement to an opening because he did not sign the list. Therefore, there is no violation of the Act.

A. Respondent did not require Ellena to sign the preferential hiring list in order to be returned to work.

The ALJ is wrong in finding Respondent required Ellena to sign the preferential hiring list to be considered for vacancies. ALJD 13:37-41, 14:13-19.; GC Exhs. 6(a), 6(b). The ALJ and General Counsel are reading language into a letter from Respondent to Ellena's regarding his unconditional offer to return to work, language that is not in the letter itself. In the letter, Respondent did not tell Ellena that he was required to sign the preferential hiring list. Ellena was only told that he could sign the list if he "wished to do so" in order for Respondent to be consistent with other employees who may be offered signing of the list in the future. GC Exhs. 6(a), 6(b). Joe Ellena offered to return to work on July 10, 2019 at 11:51 a.m. via an email forwarded by the Union to Respondent. GC Exh. 5. At the time the email was received by Respondent, Respondent had positions it was attempting to fill. Specifically, the letter from Scott Skerston, Superintendent at Respondent, reads:

> Dear Joe:
>
> I received the email from Steve Russo that had attached to it your letter stating your unconditional and immediate offer to return to work immediately.
>
> There are no job openings at this time. The Company has established a preferential hiring list which you are welcome to sign if you wish to do so. The preferential hiring list is located at Vermilion.
>
> If you have any questions, please call me at (815) 481-7445.
>
> I am also sending a copy of this letter to Steve Russo by email (SRusso@local150.org) and request that he also contact you to tell the information contained in this letter.
>
> Sincerely,
>
> Scott Skerston

Superintendent

GC Exh.6(a). The letter did not state that Ellena must come to Respondent to sign the preferential hiring list in order to be recalled. *Id.* Respondent has not interfered with Ellena's rights as a former striker upon his unconditional offer to return to work because Ellena was not required to sign the preferential hiring list in order to be brought back to work at Respondent. Further, despite the ALJD stating a copy of the preferential hiring list was attached to the letter from Respondent to Ellena regarding his offer to return to work, Respondent did not attach a copy, and no one entered testimony suggesting that such a copy was attached. ALJD 14:19-21.

B. Ellena's not signing the preferential hiring list has no effect on his eligibility to return to work or his wages, hours, or terms and conditions of employment.

The preferential hiring list does not negatively affect Ellena. Ellena is the only striker that offered to return to work when there was not a vacancy, and he currently is the only striker seeking return to work. Therefore, it is not necessary for his name to be on a physical preferential hiring list to establish recall because he will be returned to work for the next vacancy, and there are no names on the list that take precedence over him. According to *Merriam-Webster,* a "list" is defined as "a simple **series** of words or numerals (**such as the names of persons** or objects)." *Merriam Webster,* "List" last visited Dec. 31, 2019 https://www.merriam-webster.com/dictionary/list (emphasis added). This definition demonstrates that a list must contain more than just one word, numeral, or name of a person. The language of *Peerless Pump Co.*, 345 NLRB 371, 375 (2005), indicates the same line of thinking as to who must be included on a preferential hiring list: "individuals," as opposed to a single individual such as Ellena.

In *Peerless Pump,* a large group of former strikers gave their unconditional offer to return to work and, therefore, were seeking reinstatement. The need and requirement for a list as established in *Laidlaw Corp.*, 171 NLRB 1366 (1968), was logical: "...Respondent was obliged

under *Laidlaw* to reinstate those individuals to their former jobs or, if no vacancy then existed, to place them on a nondiscriminatory recall list until a vacancy occurred." *Peerless Pump*, 345 NLRB at 375. However, in our case, although Respondent was not required to establish a preferential hiring list because no list could be created with just a single name (Ellena), Respondent still offered Ellena the option of signing his name to the "list." Regardless of whether Ellena chose to place his name on the preferential hiring list or not, Ellena would be the first to be recalled to work. Thus, Ellena's signing or not signing the preferential hiring list does not violate Section 8(a)(3) of the Act because it will not affect his wages, hours, or other terms and conditions of employment.

C. Respondent did not discriminate under Section 8(a)(3) against Ellena by offering him the opportunity to sign the preferential hiring list.

Respondent giving Ellena the opportunity to sign the preferential hiring list is not Section 8(a)(3) discrimination. There was no vacancy when Ellena offered to return to work on July 12, 2019. Similarly, no employee has been hired by Respondent since July 12, 2019. Therefore, Ellena has not been treated less favorably than other employees who have offered to return to work when there were no vacancies because there are no such employees.

In *Peerless Pump*, a large number of former strikers were seeking job reinstatement. The establishment of a preferential hiring list was necessary to establish order of recall for the workers that offered to return to work. However, the employer in that case placed additional burdens on the former strikers by requiring them to come to employer directly in order to sign the preferential hiring list. In our case, Ellena was the only former striker seeking reinstatement when there were no available positions, and because there is no such thing as a list of just one thing, item, or person, it was not necessary for Respondent to establish and place Ellena's name on a preferential hiring list. Additionally, because Ellena is the only former striker seeking reinstatement, there are no

comparators that could be similarly situated to Ellena because in order to have a comparator, there must be at least two or more people. Respondent has not and cannot place additional burdens on Ellena as a former striker that would put him higher up on the preferential hiring list because he is on a so-called "list" of one. Therefore, it is impossible for Respondent to discriminate against Ellena under Section 8(a)(3) because Ellena is the sole former striker seeking reinstatement.

VI. ARGUMENT FOR EXCEPTIONS 14-15 (CHARGE 25-CA-234477)

The Complaint alleges Respondent violated the Act by making a unilateral change to the punch-in policy in January 2019 "to require that employees punch in no more than five minutes before the start of their scheduled shifts" without prior notice to Union or opportunity to bargain. GC Exh. 1(cc). ¶ 8. The ALJ erred in finding Respondent unilaterally changed a policy requiring Respondent to give the Union notice or an opportunity to bargain. Respondent did not unilaterally change terms and conditions of employment subject to mandatory bargaining when it posted the five-minute punch-in notice because it was not a change.

In December 2018, several employees were punching in significantly earlier than they were scheduled to start in order to get unscheduled, unauthorized overtime pay. Indeed, at the hearing, witnesses from the bargaining unit admitted to noticing in December that some employees were clocking in early and that the witnesses resolved to depart from their authorized schedule to punch in early, which they did.

> Tr. 137
> . . .
>
> Q And to the best of your knowledge, have you ever had a discussion with other employees about punching in early?
> A Yes, sir.
> Q And who did you have that discussion with?
> A Lyle Calkins, Scott Currie, and Joseph Allena.
> Q And when did that discussion take place?
> A Early January of 2019.

....

24 Q Okay, and what was discussed?
25 A There was an employee that I work with that punches

Tr. 138

1 in early, and Joseph Ellena was working at the
2 Vermillion Quarry, and stated that there were employees
3 down there punching in early, as well.
4 Q Okay.
5 A And they were being paid for their overtime.
6 Q Okay. So, when they punched in early, how were
7 they getting paid?
8 A They would get paid from the minute they punched
9 in.
10 Q Okay, would that be straight time or time and a
11 half?
12 A Time and a half.
13 Q So that was overtime?
14 A Yes.
15 Q And what, if anything, did you do in response to
16 that discussion?
17 A I decided that I was going to punch in early and
18 see if they paid me.
19 Q Okay, and when did you start doing that?
20 A It was mid-January of 2019.
21 Q And so on the first day of -- you said you clocked
22 in early, what time did you clock in?
23 A I believe it was 5:30, give or take five minutes.
24 Q And how often did you do that?
25 A For three consecutive days.

Tr. 139

1 Q And what, if anything, happened on the fourth day?
2 A I believe the third day was a Thursday, and we
3 don't work Fridays. We did not work the following
4 Monday for cold weather, so when we showed up to work on
5 Tuesday, there was a notice saying that we could punch
6 in -- can't punch in more than five minutes before our
7 start time.

Tr. 137:5 – 139:7 (Brad Lower).

Superintendent Skerston reviewed employee timecards, confirming frequent and significant early punch-ins. R Exh. 8 Bates # RSG CONS 00667-68; Tr. 237:17 – 242:6 (Scott Skerston). Skerston issued no discipline, but he did post the five-minute punch-in notice next to the time clock. GC Exh. 27; Tr. 242:3-6 (Scott Skerston).

A. Respondent did not make a change.

"An employer violates Section 8(a)(5) and (1) if it makes a material, substantial, and significant change regarding a mandatory subject of bargaining without first providing the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense." *MV Transp., Inc.*, 368 NLRB No. 66, slip op. at 3 (Sept. 10, 2019) (citing *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986)). The posting of the five-minute punch-in notice on or about January 2019 was not a unilateral change in violation of the Act. First, there has been no change to policy. Respondent did not create a new policy, but rather was enforcing the existing work schedule, consistent with its past practice. At the time of the alleged violation of the Act in January 2019 and for more than six months prior, the work schedule set by Respondent for the bargaining unit employees was 6:00 a.m. to 4:00 p.m., Monday through Thursday. Tr. at 135:16-25, 136:17-20 (Brad Lower).

General Counsel's employee witnesses admitted in their testimony that in December 2018 they departed from their usual practice by punching in early for their scheduled shift in order to get additional overtime pay. Tr. 137:5 – 139:7 (Brad Lower). Early punch-ins are problematic for Respondent because, among other things, they result in unscheduled, unauthorized overtime paid at time-and-a-half. *See e.g.*, Tr. 239:11-21 (Scott Skerston). An employee clocking in at 5:30 a.m. when he was scheduled to start at 6:00 a.m. is not adhering to the work schedule set by Respondent, and Respondent's five-minute punch-in notice is consistent with the existing work schedule.

B. Respondent enforced its existing work schedule as was its right consistent with its past practice.

If the charge were permitted to stand, Respondent would essentially be required to negotiate with the Union over whether Respondent can require employees to follow the work schedule and whether Respondent can decide when to schedule overtime, rights that certainly remain with Respondent as a matter of practice.

C. The five-minute punch-in notice was not a material, substantial, and significant change.

Even if the five-minute punch-in notice is found to have been a unilateral change, which it was not, it cannot be considered a material, substantial, and significant change regarding a mandatory subject of bargaining. Respondent sets the schedule for employees. Employees punching in more than five minutes before their scheduled start time build unscheduled, unauthorized overtime. Compliance with the five-minute punch-in does not deprive employees of any benefit for which they are entitled, and Superintendent Skerston imposed no discipline on employees for the unscheduled, unauthorized overtime that occurred prior to the five-minute punch-in notice.

D. The ALJ's ruling and the remedy fashioned by the ALJ are wrong because unilateral changes for permanent replacements do not violate the Act, even if there were a unilateral change, which there was not.

The five-minute punch-in notice is not a unilateral change for the reasons stated above. However, even if it were a unilateral change, which it is not, a unilateral change would not be a violation of the Act as to permanent replacements. An employer may deal directly with permanent replacement workers and unilaterally set wages, hours and terms and conditions of employment for replacements. *See e.g., Capitol-Husting*, 671 F.2d at 246.

Therefore, if there had been a unilateral change in punch-in time, it would not have been a violation of the Act as to permanent replacements. Nevertheless, the ALJ states:

> The General Counsel alleges that respondent violated 8(a)(5) and (1) of the Act by changing its punch-in policy to require unit employees punch in no more than five minutes before the start of their scheduled shift without affording the Union notice and an opportunity to bargain. I find that the General Counsel has proven this violation.

ALJD 12:30-34.

By finding a violation as to the bargaining unit, which includes permanent replacement workers, the ALJ has necessarily found, contrary to the law, that a unilateral change is a violation for permanent replacement workers since permanent replacement workers are in the bargaining unit.

Next, the ALJ fashions a remedy which requires the employer to rescind the punch-in policy for its unit employees:

> Furthermore, having unilaterally changed the punch-in policy for its unit employees, respondent shall, at the request of the Union, rescind the policy.

ALJD 21:22-23.

This remedy would require Respondent to rescind the punch-in policy for the bargaining unit, which includes permanent replacements. This would require that Respondent rescind the punch-in policy for permanent replacements for whom Respondent has the right to implement unilateral changes under the Act, and is necessarily contrary to the Act.

VII. ARGUMENT FOR EXCEPTIONS 16-17 (CHARGE 25-CA-242081)

At the outset it is important to know that the premise of the ALJ's credibility determinations is her incorrect conclusion that Respondent's hiring a persuader, Jim Misercola, is proof of animus. ALJD 16:23-25, 14:39-40, 12:1-26. This incorrect belief by the ALJ erroneously leads her to the conclusion that the "proof" of animus, persuader Jim Misercola, is not credible and is a thief. Had the ALJ started her analysis by correctly acknowledging that the Respondent has the right to employer a persuader, Jim Misercola, due to the Respondent's free speech rights under Section 8(c) of the Act, her analysis would have been different, and her conclusion would have been

correct. 29 USC § 158(c); *see also, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Unfortunately, that is not the case.

The Complaint alleges, and the ALJ erred in finding, Respondent through its agent, Jim Misercola, interfered with the Section 7 rights of employees in violation of Section 8(a)(1) by removing Union picket signs from public property on or about January 2, 2019. ALJD 20:25-26, 20:34-35; GC Exh. 1(cc) ¶¶ 5(a), 9. Respondent denies the allegations. First, Misercola, Respondent's persuader, unequivocally denies having removed any sign. Tr. 312:1-3 (James Misercola). Second, General Counsel and the Union's witnesses admitted at the hearing they knew Misercola was a persuader hired by Respondent, they did not like him because of his role (the police report entered as General Counsel Exhibit 24 further state their animosity for Misercola in that they regard him as a "Union buster"), they could identify him by sight, they were sitting in or standing immediately outside a truck 80 yards away when the alleged act took place, and they did not actually see him remove a sign. ALJD 10:40-11:5; Tr. 97:7-23, 100:19-25, 101:1-14, 102:7-25 (Thomas Brown); Tr. 116:5-125:8 (Shane Bice).

General Counsel's exhibits allegedly showing tire tracks on the side of the road where the allegedly stolen sign had been positioned are not at all persuasive as they fail to show the removal or theft of any sign by Misercola. GC Exhs. 25(a), 25(b), 26; Tr. 99:1-8 (Thomas Brown). There was no proof that the alleged tire tracks were actually even tire tracks, and even if they had been tire tracks, there was no tie-in or relationship made to Misercola.

The basis of the allegation is that Respondent acted to intimidate, coerce, or otherwise interfere with employees' protected Section 7 rights. However, the evidence does not support the allegation that such interference is likely to have resulted from the alleged violation. The Union began its strike in March 2018, and it continues to this day. R Exh. 1. Permanent replacement

workers and returning strikers regularly have had to cross the picket line to get to work. The absence of a single picket sign for a short period of time, even if removed by Misercola, which it was not, is unlikely to have dissuaded any permanent replacements or returning strikers from deciding whether to exercise their Section 7 rights, nor is it likely to have dissuaded a striker from continuing to do so.

VIII. CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Board sustain Respondent's Exceptions to the Administrative Law Judge's Decision, vacate the Administrative Law Judge's Decision and findings, and dismiss the General Counsel's Amended Consolidated Complaint in its entirety.

Date: February 8, 2021

TROY GROVE QUARRY, a Division of RIVERSTONE GROUP, INC., and VERMILION QUARRY, a Division of RIVERSTONE GROUP, INC., Respondent,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 33

TROY GROVE A DIV. of RIVERSTONE GROUP INC., VERMILION QUARRY, A DIV. OF RIVERSTONE GROUP INC.	)	
Respondent,	)	
and	)	Cases 25-CA-234477 25-CA-242081 25-CA-244883 25-CA-246978
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO	)	
Union.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 8, 2021, the foregoing RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION was electronically filed with the National Labor Relations Board and served upon the following:

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